RE PENGKALAN KOTA BYE-ELECTION TEOH TEIK HUAT v. LIM KEAN SIEW & ANOR.

[Election Petition (Abdoolcader J.) February 9, 10 & 12, 1981]
[Penang — Election Petition No. 1 of 1981]

Elections — Application to avoid election — Allegation of corrupt practice — Alleged statement by Minister of Finance — Making of statement not proved — No corrupt practice — Election Offences Act, 1954, ss. 10(a), 11, 32(c), 37.

In this case the petitioner sought to avoid the election of the first respondent on the ground that that a corrupt practice had been committed. Reliance was placed on a statement published in the *New Sunday Times* that the Minister of Finance had stated "If the Barisan Nasional win, I will personally give more money for the improvement of Pengkalan Kota." The Minister of Finance in his evidence denied making the alleged statement. He stated what he said was to the effect "If we (meaning the Barisan Nasional) win we shall make allocation to bring more development for the benefit of people in the area."

Held: (1) in the face of all the evidence and in particular the denial of the Minister of Finance, the petitioner had not achieved that burden of proof incumbent on him to prove that the statement complained of was in fact made;

(2) the statement in question even, if it was made, did not amount to bribery within the meaning of section 10(a) of the Election Offences Act, 1954 and therefore there was no corrupt practice under section 11 of the Act and no ground for declaring the election of the first respondent void.

Cases referred to:-

(1) *Balwant Rai Tayal* v. *Bishan Saroop & Anor.* 17 E.L.R. 101.

(2) *Gangadhar Maithani* v. *Narendra Singh Bhandari* 18 E.L.R. 124.

(3) *Ghasi Ram* v. *Dal Singh* A.I.R. 1968 S.C. 1191, 1195-1196.

(4) *Om Prabha Jain* v. *Abnash Chand* A.I.R. 1968 S.C. 1083, 1086

ELECTION PETITION.

Karpal Singh (*N. Shanmugam* and *K. Govindaraju* with him) for the petitioner.

Raja Abdul Aziz Addruse (*R.J. Manecksha* with him) for the respondent.

Datuk Abu Talib bin Othman (Attorney-General, Malaysia) for the 2nd respondent.

N.T. Vello watching brief for the *New Straits Times.*

Cur. Adv. Vult.

Abdoolcader J. (delivering oral judgment): In an aftermath of the by-election for the Penang State constituency of Pengkalan Kota on November 15, 1980 which appears to have attracted and aroused as much interest and excitement as Lady Godiva perhaps would in riding down Gurney Drive on Chap Goh Meh, Teoh Teik Huat who was a voter and the Democratic Action Party candidate thereat seeks by this petition to avoid the election of the Barisan Nasional candidate, Lim Kean Siew, the 1st respondent, who was returned as duly elected, on the sole ground that a corrupt practice under section 32(c) of the Election Offences Act, 1954 was committed by Tengku Razaleigh Hamzah, the Minister of Finance for Malaysia, in connection with this election with the knowledge of the 1st respondent in that at about 8.00 p.m. on November 8, 1980 at a dialogue session during the election campaign at 46, Presgrave Street, Penang in the constituency in question, in the presence and hearing of the 1st respondent and two other Ministers he is alleged to have said to a crowd of over 1,500 people comprising largely of electors or voters and people in the constituency: 'If the Barisan Nasional win, I will personally give more money for the improvement of Pengkalan Kota.' The petitioner further contends that this statement was published in the *New Sunday Times* issue on November 9, 1980 and that as it was widely reported in the press and the crowd addressed by the Minister principally comprised of voters or electors in the constituency this statement must have induced such voters to vote for the 1st respondent in the election.

Section 11 of the Act defines and prescribes the punishment for a corrupt practice which by sub-section (1)(b) thereof includes the offence of bribery, and section 10 provides that the persons specified therein shall be deemed guilty of the offence of bribery in the circumstances enumerated in that section, the material provision for the purposes and in the context of this case being that in paragraph (a) thereof which reads:

"(a) every person who directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises, or promises to procure or to endeavour to procure, any money or valuable consideration to or for any elector or voter, or to or for any person on behalf of any elector or voter or to or for any other person, in order to induce any elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such elector or voter having voted or refrained from voting at any election;"

I should perhaps observe that at the outset of the hearing I acceded to a motion by the Attorney-General to strike out the returning officer who was joined as the 2nd respondent in these proceedings as it is abundantly clear he is a wholly unnecessary party with no concern whatsoever in the allegation on which the petition is founded.

The first question for determination, a factual one, is whether the statement attributed to Tengku Razaleigh and which I have referred to was in fact made by him. Tengku Razaleigh was called as a witness on behalf of the petitioner and in his evidence he denies making the statement in issue and states that he spoke in bazaar Malay in order to communicate with the people and that as he began speaking the crowd present started cheering and applauding and did so most of the time and that what he said was to this effect: 'If we (meaning the Barisan Nasional) win, we shall make allocation (in the Malay version using the words "plenty of money") to bring more development for the benefit of the people in the area.' He gave the Malay version of what he said and states that that is the continuing pledge of the Barisan Nasional, and that what appeared in the *New Sunday Times* issue of November 9, 1980 is therefore a wrong translation

in English of what he said in an extemporaneous address given on the spur of the moment when he was called upon to speak. He is substantially corroborated in this respect by Dato Dr. Neo Yee Pan, the Minister of Housing and Local Government, and Dato Mak Hon Kam, the Deputy Minister of Finance, who were present that evening and testified as witnesses for the petitioner and also by the 1st respondent under cross-examination.

The whole case for the petitioner basically and primarily rests on the statement in question in the report appearing in the *New Sunday Times* issue of November 9, 1980 and the author of the report, Yeoh Kok Ooi, a reporter attached to the *New Straits Times* organisation in Penang, was called as a witness for the petitioner. His evidence is if anything more than equivocal, erring if at all on the side of honesty. He admits that Tengku Razaleigh spoke in simple Malay and that what appeared in his report was his own translation in English and that as far as he is concerned this was a correct translation. When I asked him, however, to repeat the words used in Malay by Tengku Razaleigh he in fact gave a translation of what appears in his newspaper report except for the omission of the word "personally". When I then asked why he had omitted this word which as Mr. Karpal Singh for the petitioner submits in his final address is very significant and of crucial importance to the charge made, Yeoh says that he cannot recall whether Tengku Razaleigh used the word "personally" in Malay. He added that the crowd there was quite noisy and that he could have misheard Tengku Razaleigh and some of the words used. Under cross-examination he admits that as Tengku Razaleigh spoke there was constant clapping and applauding and that he took down notes in English as Tengku Razaleigh spoke in Malay, doing an instantaneous and mental free translation and not a literal one, and he further goes on to admit that looking at his report appearing in the *New Sunday Times* of November 9, 1980 he cannot recall what was actually said. In re-examination when pressed by Mr. Karpal Singh as to whether his report contained what Tengku Razaleigh said to the best of his knowledge, Yeoh firmly maintains that his report contained what Tengku Razaleigh said to the best of his ability but not to the best of his knowledge. In the face of all this Mr. Karpal Singh had perforce to admit somewhat cautiously and grudgingly in his final submission in answer to a direct question I put to him that this witness has, as he puts it, wavered to an extent. In the light of evidence of this nature it is manifestly evident that the petitioner has not discharged the strict burden of proof necessary to establish that the statement in question was in fact made by Tengku Razaleigh which he alleges constitutes bribery under section 10(a) of the Act.

Much is made of the fact that no retraction or correction of the report in question of the statement attributed to him was made by Tengku Razaleigh at any time. He however explains in his testimony that his press secretary brings to his attention press reports and that he has been misquoted so many times that he makes corrections only where policy and very important matters are involved and that he did not attach very much importance to this particular report. Mr. Karpal Singh also stresses the point that no retraction was made at a press conference at Parliament House on November 25, 1980 and of reports appearing in the issues of the *Star* of November 18 and November 26, 1980 and the *New Straits Times* of November 18, 1980. Tengku Razaleigh makes it clear in his evidence that no question was ever put to him by reporters as to whether he had in fact said the words appearing in the *New Sunday Times* issue of November 1980 when asking him as to his reaction to the threat by Mr. Karpal Singh to take him to court after the latter's motion to debate the matter in Parliament was rejected by the Speaker of the House of Representatives, and in relation to the statement attributed to him in the issue of the *Star* of November 26, 1980 that when he had said "I" in pledging more money, he meant "I as the Finance Minister on behalf of the government and not I as Tengku Razaleigh", he admits that he did say this in response to questions raised by reporters with regard to the statement alleged to have been made by him but says his answer was a general one meant to be of general application and did not relate specifically to the particular statement imputed to him in the newspaper report in question.

In the face of all this evidence and in particular the unreserved equivocation of the author of the report in which the statement alleged to offend against the Act appears, and I might add it is highly significant that it does not appear in any other newspaper report of the proceedings at the dialogue session at which Tengku Razaleigh spoke, the petitioner has not achieved that burden of proof incumbent on him to establish that the statement complained of was in fact made and I have no hesitation in accepting the evidence of Tengku Razaleigh that he did not use the words appearing in that report and that he only said words to the effect stated in his evidence and which I have adverted to. Dato Dr. Neo and Dato Mak and the 1st respondent in their evidence confirm that the effect of what Tengku Razaleigh said at the dialogue session was for development of the constituency in fulfilment of the government's pledge to the country as a whole. The petitioner himself admits in giving evidence that in the course of the campaign he also made election pledges to the effect that if he was elected he would try to improve the condition of the constituency, and in cross-examination he agrees one of the ways of doing that would be by providing funds.

Mr. Karpal Singh however submits in the alternative that even on Tengku Razaleigh's version of what he said on that occasion, a corrupt practice was committed in respect of the first part of what he states he said in Malay to the effect that if the Barisan Nasional (using the pronoun "we") wins, plenty of money would be given. I cannot accept this argument as having any substance whatsoever, as Tengku Razaleigh states in his evidence that he went on im-

mediately to continue to say this was in order "to do a lot" (the clear implication being for the people of that constituency) and this was the pledge or promise of the Barisan Nasional, and in the context of the statement he says he made, taken as a whole, it was no more than a pledge by the Barisan Nasional for allocation of funds for development of the constituency for the benefit of the people in that area.

My finding as to the statement complained of and constituting the basis and substratum of the petition before me would accordingly effectively dispose of this matter and lay it to rest. I think however I should perhaps also briefly touch on and discuss the position on the assumption that the statement in question which the petitioner alleges and relies on was in fact made by Tengku Razaleigh, and indeed the arguments addressed to me in final submissions were put forward on this alternative basis when I indicated to counsel on both sides on the conclusion of taking evidence the issues involved for determination in this case. I now proceed accordingly to do so on this assumption although as a question of fact I have held otherwise.

Adverting briefly to the requisite elements of sections 10(a), 11(1) and 32(c) of the Act for the purposes of these proceedings, in a corrupt practice such as bribery which is alleged in this case the corrupt intention and corrupt inducement to the electors or voters to vote or refrain from voting must exist. The corrupt practice of bribery which is a criminal offence by statute must be strictly proved beyond all reasonable doubt by clear and unequivocal evidence, and the inducement to vote or refrain from voting must be exercised upon one or more electors or voters who must be identified as the objects to whom it was made or addressed. There is no such specific or identifiable particularity in this case but only an allegation of an address to a faceless and amorphous crowd of somewhat uncanalised fluidity of over 1,500 people said to have been largely comprised of electors or voters and people of the constituency. The petitioner has elicited no evidence whatsoever from the witnesses he called to testify or even in cross-examination of the 1st respondent that any voter or elector was present on that occasion, and when I raised this with Mr. Karpal Singh he could only say that it was very likely that electors or voters were present at the dialogue session and that this was more than probable. All I need say on this is that in a case of corrupt practice, suspicion, however strong, will not be enough, and the requisite elements of the relevant statutory provision must be established to the degree I have indicated earlier.

The utterance complained of as offending against the Act was moreover a promise of public action made by the Minister in charge of the country's fiscal portfolio. As indeed Raja Abdul Aziz Addruse for the 1st respondent submits, Tengku Razaleigh was not himself the Barisan Nasional candidate in the election and there is no reason why he should pledge his personal fortune as is alleged. The High Court of Punjab held in *Balwant Rai Tayal* v. *Bishan Saroop & Anor.*[1] that a candidate can make a promise to Harijans of a locality while canvassing for votes that he would do his best to help them in the matter of retaining an old mosque as a temple and for getting land for building houses and that this does not amount to bribery. The High Court of Allahabad decided in *Gangadhar Maithani* v. *Narendra Singh Bhandari*[2] that where it was said that persons other than those belonging to the Congress Party had not proved beneficial to the constituency and that if the Congress candidate is elected he would obtain benefits for the voters because he was a member of the Congress Party but there was no threat that the Congress candidate would use his influence as a Congress member or would influence the Ministers not to carry out the beneficial schemes in the constituency in case he was not elected, no corrupt practice by way of bribery or undue influence was committed. I would also refer to the decisions of the Supreme Court of India in *Ghasi Ram* v. *Dal Singh*[3] (at pages 1195-1196) and *Om Prabha Jain* v. *Abnash Chand*[4] (at page 1086) which are instructive in this respect.

On a careful and considered examination and evaluation *secundum subjectam materiam* of the alleged statement around which the petitioner's case revolves in relation to its form and contents viewed in the light of the relevant provisions of the Act, the law and the evidence adduced, I can only conclude, in a penumbra of phrases knitted in alliteration that the words allegedly uttered by Tengku Razaleigh to the effect that if the Barisan Nasional wins, he would personally give more money for the improvement of Pengkalan Kota, perceived in passionless and proper perspective in the context of an election campaign often conducted with a fervour calculated to outdo even the Befrienders and invariably pregnant with partisan promises and in which some forensic flexing of political muscle is not an uncommon or unknown phenomenon, did not perforce pose or constitute a promise or pre-engagement by him in his personal capacity with any corrupt intention of any designated sum of money or valuable consideration to or for any one or more particular elector or voter for corrupt inducement to exert his or her personal predilection at the polls in favour of the 1st respondent but were in effect and in intention no more than a broad political articulation in his office as Minister of Finance of the party in power's potential pull on the public purse-strings to pursue promises, propitiate pleas and propel and promote projects and programmes for amelioration and development in the constituency for the benefit and progress of that locality and all its commorants generally if the ruling party gained the seat in contest and that he was personally in a position within the pale of his portfolio as the Minister to sanction schemes and endorse expenses on behalf of the government to this end. To hold otherwise in the circumstances of this case would be to effectuate and sanction a spurious conversion of political proclamations and catchwords manifested as a promise of public action into an inflexible electoral offence with criminal connotations bereft of the essential prerequisites therefor.

The statement in question even if it was made, and I have factually found it was not, does not therefore amount to bribery within the meaning of section 10(a), and it follows there has been no corrupt practice under section 11, no ground accordingly exists for declaring the election of the 1st respondent void under

section 32(c) of the Act, and the result will be, to adopt a phrase from Admiralty practice, to let his return of due election lie as is, where is. No question accordingly arises for consideration as to the knowledge of the 1st respondent for the purposes of section 32(c) of the Act. A charge of electoral corrupt practice is an extremely serious matter and I should perhaps in fairness also add that Tengku Razaleigh emerges wholly unscathed and vindicated in these proceedings.

The petition therefore fails on either aspect and is dismissed with costs. I shall certify accordingly to the Election Commission under the provisions of section 36 of the Act and also report in writing to the Commission as required by section 37 that no corrupt practice has been proved to have been committed with the knowledge of the 1st respondent as alleged by the petitioner or at all.

A caveat however in conclusion: I have dealt with the matter before me strictly on its facts and circumstances and what I have said must not be taken to bestow an unbridled licence on would-be political brawn crackers to transcend the twilight zone between campaign pledges and promises and electoral misfeasance, as the next step beyond might well make all the difference.

On an application by Raja Abdul Aziz on the matter of costs, I certify for two counsel for the 1st respondent.

Order accordingly.

Solicitors: *Karpal Singh & Co.; Lim Kean Siew & Co.; Chang & Vello.*